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No. 07-649

IN THE

Supreme Court of the United States

CHICAGO TITLE INSURANCE CORP.,

Petitioner,

v.

FIRST AMERICAN TITLE INSURANCE CO. AND JAMES A. MAGNUSON,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The petitioner in this matter raises the following issues (Petition for Writ of Certiorari at i):

1. Whether the due process guideposts govern only the *size* of punitive damages awards, or whether—despite this Court's overruling of *Lochner v. New York*, 198 U.S. 45 (1905)—the guideposts also license federal judicial interference with a State's considered judgment that certain types of misconduct are so egregious as to warrant punitive liability in the first instance.

2. Whether the "reprehensibility" guidepost of *Gore* and *State Farm* can support an assessment of punitive damages when the defendant's tortious conduct was malicious or whether that guidepost requires a showing of an additional aggravating factor, such as the financial vulnerability of the plaintiff or the risk of physical harm.

3. Whether a defendant qualifies as a "repeated wrongdoer" (for purposes of the "reprehensibility" guidepost of *Gore* and *State Farm*) if it commits multiple reprehensible acts within a single transaction with the plaintiff, or whether the "repeated wrongdoer" test requires that additional acts be committed against parties other than the plaintiff.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties in the United States Court of Appeals for the Sixth Circuit were (a) Chicago Title Insurance Corporation, (b) First American Title Insurance Company, and (c) James A. Magnuson.

First American Corporation, a publicly held company, is the parent company of Respondent First American Title Insurance Company. No other publicly held company owns ten percent or more of First American Title Insurance Company's stock.

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BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT

In this breach of contract and tort diversity action brought under Ohio law, plaintiff Chicago Title Insurance Corporation seeks review of an unexceptional application of the Court's holding in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). In the decision below, the Sixth Circuit reversed a $43.2 million judgment, remanding the matter for a new trial on compensatory damages and holding that the facts of the case, when measured against *State Farm*'s due process guideposts, could not support a punitive damages award.

This factbound decision does not merit the Court's attention. As an initial matter, the case is a poor vehicle for reviewing issues regarding punitive damages due to the remand for a new trial on *compensatory damages*. Because compensatory damages are a necessary predicate under Ohio law for a punitive damages award, there is no basis at this stage for the Court to consider issues regarding *punitive damages*. Equally true, because the Sixth Circuit left unanswered whether state law would even permit a punitive damages award in this case, there are independent and adequate state law grounds for resolving these punitive damages issues in the lower courts, should compensatory damages ultimately be awarded.

In addition to these vehicle problems, today's case does not present any issue or circuit split meriting the Court's review. At bottom, plaintiff challenges

the Sixth Circuit's application of the Court's unbroken precedent addressing due process limitations in the punitive damages context, a setting that rarely attracts the Court's attention. *See* SUP. CT. R. 10 (the Court typically does not review "asserted errors consist[ing] of erroneous factual findings or misapplication of a properly stated rule of law").

I. DISTRICT COURT PROCEEDINGS

Chicago Title, a leader in the title insurance industry, brought breach of contract and tortious interference claims against First American Title Insurance Company and James A. Magnuson (collectively, "First American") based upon Magnuson's decision to leave Chicago Title to work for competitor First American. Pet. App. 2a-4a. Chicago Title's claims turned on a non-compete clause in Magnuson's employment contract with Chicago Title, which the district court interpreted to be effective for a period of five years beyond the contract's expiration. Pet. App. 2a-3a.

The district court granted summary judgment for Chicago Title as to liability on its contract claim against Magnuson and its tort claim against First American. Pet. App. 4a. At trial, the district court granted Chicago Title's motion for judgment as a matter of law on the ground that it was a "lost volume seller," exempting it from the general duty to mitigate its damages. Pet. App. 21a. Having been instructed that Chicago Title had no duty to mitigate its asserted damages, the jury returned a verdict

awarding Chicago Title $10.8 million in compensatory damages and $32.4 million in punitive damages. Pet. App. 4a-5a.

II. APPEAL TO THE SIXTH CIRCUIT

Before the Sixth Circuit, First American argued, among other things, that (1) the non-compete clause was not enforceable through the five-year period after Magnuson's contract expired; (2) the district court erred in granting summary judgment on Chicago Title's claims; (3) there is no basis under Ohio law for the award of punitive damages; (4) the punitive damages award is unconstitutional; and (5) the district court erroneously failed to instruct the jury on Chicago Title's duty to mitigate. Pet. App. 5a.

A. Compensatory Damages

After affirming the grant of summary judgment, Pet. App. 2a, 5a-18a, 29a, the Sixth Circuit reversed the $10.8 million compensatory damages award. Pet. App. 19a-21a. Because the district court erred in holding that Chicago was a lost-volume-seller as a matter of law, the Sixth Circuit remanded the case for a new trial at which the jury could consider whether Chicago Title was a lost-volume seller and, if not, whether it mitigated its damages. Pet. App. 19a-21a, 29a.

The Sixth Circuit also remanded the case for a new trial on compensatory damages on the additional ground that the district court may have erred in instructing the jury that Magnuson's non-compete clause was in effect for five years after his contract's expiration. Pet. App. 21a-23a. While the Sixth

Circuit found that the covenant not to compete was reasonable for at least two years, it remanded for further factual development regarding whether it was reasonable to enforce the covenant for up to five years, the period the jury considered in awarding compensatory damages. Pet. App. 22a-23a.

B. Punitive Damages

Applying the Court's decisions in *State Farm* and *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), in particular the command that appellate courts "overturn[] jury verdicts awarding punitive damages that are so large that they constitute 'grossly excessive or arbitrary punishments,'" Pet. App. 23a (quoting *State Farm*, 538 U.S. at 416), the Sixth Circuit also reversed the $32.4 million punitive damages award. Pet. App. 23a-29a. Noting that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence,'" Pet. App. 25a, 29a (quoting *State Farm*, 538 U.S. at 419), the Sixth Circuit found that *State Farm*'s "three guideposts [for] considering the constitutionality of a punitive damage award" could not justify any award in this case. Pet. App. 23a.

Starting with the reprehensibility guidepost, the "'most important indicium of the reasonableness of a punitive damages award,'" Pet. App. 24a (quoting *Gore*, 517 U.S. at 575), the Sixth Circuit observed that "[t]he harm here was economic, not physical, and

the health or safety of others were not in danger." Pet. App. 25a; *see also State Farm*, 538 U.S. at 419. "[A]ssum[ing], for sake of argument, that First American acted maliciously rather than by accident," Pet. App. 25a, given the district court's finding that First American tortiously interfered with the contract at issue, the Sixth Circuit focused on "Chicago Title's financial vulnerability [and] whether First American's conduct was repeated." Pet. App. 25a. As to the former, the Sixth Circuit found that, "[o]n these facts," "it would violate the plain meaning of the term to hold that Chicago Title was financially vulnerable." Pet. App. 26a. And as to the latter, the Sixth Circuit, citing *Gore*, reasoned that the "repeated conduct" factor "require[d] that the similar reprehensible conduct be committed against various different parties rather than repeated reprehensible acts within the single transaction with the plaintiff." Pet. App. 26a (internal quotation marks omitted). Because there was no evidence "that First American engaged in the same type of tortious behavior against other competitors that it displayed against Chicago Title," this reprehensibility factor also was not met. Pet. App. 27a.

After twice quoting *State Farm*'s instruction that "'[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect,'" Pet. App. 24a, 28a n.8 (quoting *State Farm*, 538 U.S. at 419), the Sixth Circuit held that the evidence was "insufficient to support a finding that First American's behavior was

sufficiently reprehensible for an award of punitive damages" in any amount. Pet. App. 28a.

REASONS FOR DENYING THE WRIT

I. THE CASE DOES NOT SQUARELY RAISE THE QUESTIONS PRESENTED.

A. The Remand Below For A New Trial On Compensatory Damages Precludes The Court's Review Of Punitive Damages Issues.

Because an award of compensatory damages is a necessary predicate for an award of punitive damages, this case is a poor vehicle for effectively addressing the questions presented. For one thing, the result of the new trial on compensatory damages may render the punitive damages analysis moot. If the jury decides to award compensatory damages of $0 in this diversity action, Ohio law would not permit a punitive damages award. *See* OHIO REV. CODE § 2315.21(B), (C); *Malone v. Courtyard by Marriott L.P.*, 659 N.E.2d 1242, 1248 (Ohio 1996).

For another thing, without knowing the amount of compensatory damages or the precise basis for the award, the Court could not complete its review under the *State Farm* guideposts. "The precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff," *State Farm*, 538 U.S. at 425, and not until the jury reconsiders the case will the underlying factual record be complete. Equally true, the lack of a compensatory award makes it impossible to calculate the ratio of compensatory damages to punitive damages. *See id.*

("few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"). Although Chicago Title attempts to cast this case as a natural successor to *Gore* and *State Farm*, those cases do not resemble this one, largely because the compensatory damages awards there were not subject to change or challenge at the time the Court reviewed the punitive damages award. *See id.* at 415; *Gore*, 517 U.S. at 565.

In view of the uncertainty of the outcome at the new trial, accepting review at this stage would be premature at best. *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 4.18, at 258 (8th ed. 2002) (discussing the Court's practice of denying certiorari at an interlocutory stage where the case may take on a different aspect as it proceeds in the trial court). Unlike cases in which "Supreme Court intervention may serve to hasten or finally resolve the litigation," such as reviewing the denial of summary judgment or a motion to dismiss, a review of the punitive damages award here will not abbreviate, much less end, this case. *See id.* at 260 (citing cases).

B. A Threshold State-Law Issue Makes This Case A Poor Candidate For Review.

The Court's review is unwarranted for the additional reason that there is an independent and adequate state law ground for resolving the punitive damages issues in this case. First American argued below that Chicago Title was not entitled to punitive damages as a matter of state law in this

business/economic injury case because Chicago Title did not meet the Ohio standard for "malice," which permits a punitive damages award only where an individual's "rights and safety" are at issue. *Preston v. Murty*, 512 N.E.2d 1174, 1174, 1176 (Ohio 1987) (defining "malice" to include conduct reflecting "a conscious disregard for the rights and safety of other persons that has a greater probability of causing substantial harm"). The Sixth Circuit, however, opted to resolve this case on federal due process grounds, expressly leaving unanswered whether state law even authorized a punitive damages award here. Pet. App. 29a n.9 ("Since punitive damages are inappropriate in this case due to insufficient reprehensibility of First American's conduct, a number of its additional arguments are now irrelevant: .... (2) that Ohio law and the state constitution prohibit punitive damages in this case...."). As such, it is not even clear that state law would authorize an award in this case.

These independent state-law grounds may also support the Sixth Circuit's judgment, which makes the case all the more inappropriate for review. After all, were the Court to grant review, it might be left to simply remand to the Sixth Circuit to address the unanswered state-law issue, to avoid the unnecessary resolution of federal constitutional questions. *See Hutchinson v. Proxmire*, 443 U.S. 111, 122 (1979) (absent "special considerations," the Court's "practice is to avoid reaching constitutional questions if a dispositive nonconstitutional ground is available" and, where appropriate, to "remand to the Court of

Appeals to review [a] state-law question which it did not consider").

II. THE SIXTH CIRCUIT APPLIED SETTLED LAW TO THE UNIQUE FACTS OF THIS CASE.

Even if this case were a proper vehicle to address punitive damages issues, Chicago Title presents no issues meriting the Court's review. The Sixth Circuit properly adhered to the Court's decision in *State Farm*, applying the reprehensibility guidepost factors to this business tort case involving economic injury and holding that no punitive damages award is permitted here. Significant to the Sixth Circuit's analysis was the Court's instruction that "the existence of any one of th[e reprehensibility] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *State Farm*, 538 U.S. at 419. The Sixth Circuit found that no amount of punitive damages was appropriate based on the particular facts of this case. Pet. App. 24a-29a. Put another way, the Sixth Circuit held that the "size" of an award in this case must be $0. Pet. 9.

Invoking *Lochner*, Chicago Title characterizes the decision below as abrogating the State of Ohio's decision to authorize punitive damages in cases involving "malice." Setting aside whether Ohio law would even authorize an award here, *see supra*, there is nothing to support Chicago Title's dramatic reading of the Sixth Circuit's holding as interfering with a State's discretion over when to authorize

punitive damages, specifically by barring punitive damages in business tort cases. Even in those cases where a plaintiff is eligible to receive a punitive damages award under state law, federal courts have a role in reviewing "*both the severity of recognized misconduct for which punitive damages may be imposed* and the amount of such penalty that may be constitutionally awarded for particular offenses." *Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1369-70 (Fed. Cir. 2003) (emphasis added) (citing *State Farm*, where "the Supreme Court elaborated on the constraints placed by the Due Process Clause on the discretion of juries and courts"). Indeed, "[w]hile States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm*, 538 U.S. at 416.

Today's case places no limits on a state's ability to authorize a factfinder to consider whether to impose punitive damages. Once that determination is made, due process in some instances will not permit an award greater than $0. Put differently, in certain cases any punitive award would be "grossly excessive." *Id.* In instructing that punitive damages "*should only be awarded* if the defendant's culpability ... is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence," *id.* at 419 (emphasis added), *State Farm* clearly envisions instances where a court, applying *State Farm*'s due process limitations, would hold that no punitive damages are

appropriate. While Chicago Title artfully characterizes this case as a "return to *Lochnerism*" (Pet. 11), the decision is better understood as a reasonable application of recent Court precedent.

III. THE DECISION BELOW DOES NOT CREATE A CIRCUIT SPLIT.

A. The Sixth Circuit Established No Bright-Line Rule For The Reprehensibility Guidepost.

To justify its second question presented, Chicago Title describes the panel decision as one that established a bright-line, two-factor-minimum rule for the *State Farm* reprehensibility guidepost. In truth, the Sixth Circuit neither set up nor applied any bright-line rule but rather concluded that the award here was unconstitutional given the virtual absence of any of *State Farm*'s reprehensibility factors as well *State Farm*'s instruction that "'[t]he existence of any one of these [reprehensibility] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award.'" Pet. App. 24a, 28a n.8 (quoting *State Farm*, 538 U.S. at 419). Indeed, considering that the appeals court merely assumed malice "for sake of argument," Pet. App. 25a, it is not clear that the evidence supported even a showing of "*intentional* malice," one reprehensibility factor, let alone multiple factors. In the end, the Sixth Circuit properly concluded that First American's conduct was not so reprehensible as to warrant an award of punitive damages. Pet. App. 28a-29a.

B. The Decision Below Is Not In Tension With Other Courts' Decisions.

The factbound decision below did not create a split among the circuits. Chicago Title's cited cases (Pet. 21-27) represent nothing more than instances of other courts' applying *State Farm*'s due process inquiry to different facts and holding, based upon those facts, that the conduct there did support a punitive damages award. For example, the Third Circuit in *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 232-33 (3d Cir. 2005), determined that three of the reprehensibility factors contributed to establish sufficient reprehensibility to support punitive damages there. In addition, both the Eighth Circuit in *Diesel Machinery, Inc. v. B.R. Lee Industries, Inc.*, 418 F.3d 820, 839 (8th Cir. 2005), and the Second Circuit in *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63-64 (2d Cir. 2004), concluded that punitive damages were appropriate based upon the existence of two of the reprehensibility factors.

Unlike this case, many of the cases cited in the petition involved a vulnerable victim, actual fraud, a finding of "trickery, or deceit," and/or nominal or low compensatory damage awards. For example, in *Rhone-Poulenc Agro*, 345 F.3d at 1371, the defendant "materially misrepresented a past or existing fact" as part of its underlying fraud. *Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824, 828 (8th Cir. 2004), similarly involved an affirmative "scheme to defraud" that led the district court to remark that it "can hardly think of a more reprehensible case of business

fraud." In another case involving a motel chain that exposed guests to painful bites from bedbugs infesting its rooms and then lied to them about the room conditions, "[t]he defendant's behavior was outrageous but the compensable harm done was slight." *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003). And *Planned Parenthood of Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949, 959 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006), involved "intentional intimidation of physicians, aimed at forcing them to quit practicing out of fear for their lives."

All of these cases, in sum, stand in contrast to this one, which lacks "sufficiently reprehensible" conduct to support a punitive damages award. Pet. App. 28a.

IV. THE SIXTH CIRCUIT'S ANALYSIS OF THE "REPEATED CONDUCT" FACTOR PRESENTS NO CONFLICT WARRANTING REVIEW.

The Sixth Circuit's application of the *State Farm* "repeated conduct" reprehensibility factor does not create a split among the circuits justifying certiorari review. The Sixth Circuit's analysis, moreover, is entirely consistent with the Court's decisions.

A. There Is No Split Over The "Repeated Conduct" Factor That Warrants Review.

In assessing whether there were instances of past misconduct that could be considered as part of a reprehensibility analysis, the Sixth Circuit constrained its analysis to "similar reprehensible conduct [ ] committed against various different

parties," as opposed to "repeated reprehensible acts within the single transaction with the plaintiff.'" Pet. App. 26a (internal quotation marks omitted). Few circuit courts have addressed whether the "repeated actions" that satisfy this reprehensibility factor can include repeated misconduct against the plaintiff, and Chicago Title at best has identified the shallowest (1-to-1) of splits over this issue, with the possible addition of a few state courts on one side of the issue. *Compare* Pet. App. 26a *with CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 191 (3d Cir. 2007) (rejecting argument that "repeated conduct" evidence must be limited to "similar tortious acts against ... entities" other than the plaintiff).[1] Chicago Title's remaining cases merely apply the "repeated conduct" factor to repeated acts against a plaintiff and/or other persons without further analysis of whom must be the target of the "repeated actions." *E.g., Southern Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001, 1010 (9th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006); *Century*

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[1] *See also Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303, 318-19 (Ill. 2006) ("courts are permitted to consider a defendant's conduct towards the plaintiff in question, as well as similar conduct extending beyond the plaintiff's case, when determining whether a defendant can be labeled a recidivist for reprehensibility purposes"), *petition for cert. filed*, 76 U.S.L.W. 3240 (No. 07-560, Oct. 26, 2007); *Superior Fed. Bank v. Jones & Mackey Constr. Co., LLC*, 219 S.W.3d 643, 650-51 (Ark. Ct. App. 2005) (finding "repeated conduct" factor satisfied by "several statements ... made by [defendant] in what seemed to be a continuing effort to inflict harm" on plaintiff).

Sur. Co. v. Polisso, 43 Cal. Rptr. 3d 468, 499-500 (Ct. App. 2006); *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 447 (Kan. 2006); *see also Lee v. Edwards*, 101 F.3d 805, 809 (2d Cir. 1996) (applying "repeated misconduct" factor from *Gore*). In short, there is little, if any, division among the lower courts.

B. The Sixth Circuit's Analysis Of The "Repeated Conduct" Factor Is Consistent With This Court's Guidance.

In any event, the Sixth Circuit's decision regarding the "repeated conduct" factor is consistent with *Gore* and *State Farm*. While Chicago Title suggests that "conduct within a single transaction with the plaintiff" is enough to satisfy the "repeated conduct" reprehensibility factor, the Court has limited its considerations in this setting to penalizing parties engaging in "recidivist" conduct, where "the conduct in question replicates the prior transgressions." *State Farm*, 538 U.S. at 423 (citing *Gore*, 517 U.S. at 577). And to be a recidivist based upon a prior transgression, a party must have misbehaved previously in another setting, not in the same single transaction with the same plaintiff. That conclusion is consistent with the Court's recent decision in *Philip Morris USA v. Williams*, which held that "a plaintiff may show harm to others in order to demonstrate reprehensibility." 127 S. Ct. 1057, 1063-65 (2007) (holding, however, that "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties"). Indeed, notwithstanding its decision in *CGB Occupational*

Therapy, 499 F.3d 184, even the Third Circuit has acknowledged that this Court has looked only to "specific instances of similar conduct by the defendant in relation to other parties" when applying this factor. *Willow Inn*, 399 F.3d at 232.

C. There Is No Evidence Of Repeated Misconduct By First American In This Case.

Even if *State Farm*'s reprehensibility guidepost allowed for consideration of a party's repeated misconduct in the same transaction with the same plaintiff, that type of evidence is absent here. At bottom, First American's conduct involved tortiously inducing one employee to breach one contact.

V. THIS CASE HAS NO RELATIONSHIP TO THE PENDING DECISION IN *EXXON SHIPPING CO. V. BAKER*.

Finally, this case bears little resemblance to *Exxon Shipping Co. v. Baker*, No. 07-219, and the punitive damages issues Chicago Title raises here will not inform, and will not be informed by, the Court's pending decision there. *Exxon Shipping* presents issues of federal common law and statutory interpretation, primarily whether punitive damages are authorized in the first instance under maritime law. Notably, the Court denied the petitioner's request for review of the award as a matter of constitutional due process. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 492 (Oct. 29, 2007) (No. 07-219); Petition for a Writ of Certiorari, *Exxon Shipping Co. v. Baker*, 2007 WL 2383784 (U.S. Aug. 20, 2007) (No. 07-219).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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